

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KAREN CHEEVER)	
Claimant)	
VS.)	
)	Docket No. 222,132
THE BOEING COMPANY)	
Respondent)	
AND)	
)	
KEMPER INSURANCE COMPANIES)	
Insurance Carrier)	

ORDER

Claimant appeals from an Award entered by Administrative Law Judge Jon L. Frobish on December 10, 1999. The Appeals Board heard oral argument May 12, 2000.

APPEARANCES

Kelly W. Johnston of Wichita, Kansas, appeared on behalf of claimant. Vincent A. Burnett of Wichita, Kansas, appeared on behalf of claimant and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant benefits for an 8.625 percent disability of the left shoulder but found claimant is not entitled to benefits for injury to the neck. On appeal, claimant contends she also injured her neck and is entitled to a general body disability. Claimant contends the ALJ misunderstood claimant's argument. The ALJ found claimant had not proven that the work injury caused claimant's herniated cervical disc. Claimant points out she was not claiming the work injury caused the herniation, but she is claiming the work injury caused permanent impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be affirmed.

Findings of Fact

1. On January 23, 1996, claimant injured her left shoulder while lifting a panel weighing approximately ten pounds. The Board finds claimant also suffered at least a temporary injury to her neck at the same time.

2. Claimant was seen at Boeing Central Medical on that same day and referred to Dr. J. Mark Melhorn.

3. Claimant first saw Dr. Melhorn January 23, 1996. Claimant completed pain drawings for Dr. Melhorn. The drawings show pain near the spine. Although Dr. Melhorn did not interpret the drawings as reference to neck pain, claimant testified this was what she intended.

4. Dr. Melhorn treated only claimant's shoulder. He did not rate claimant's impairment for the shoulder. Claimant had continued the last exam but did not schedule a follow up. Dr. Melhorn testified that if the complaints continued, he would have rated the impairment for the shoulder injury as 3.25 percent of the shoulder. He recommended she avoid work requiring hands at heights above shoulder level. These were restrictions following two exams, and he testified he would have reconsidered the restrictions if he had seen claimant again.

Dr. Melhorn did not note any complaints that he considered to be complaints of neck pain.

5. Claimant also treated with Dr. Matthew E. Goltl and Dr. Joe E. Zollinger, II, both chiropractors, beginning in March 1996. Notes from the initial visit reflect back and neck pain. For later visits, the records do not show a specific neck complaint but the records do show the chiropractor found what he considered to be inflammation at the C-7 level.

6. Claimant was in an automobile accident on April 24, 1996, and two or three days later began having neck pain, more severe than the symptoms she had before the automobile accident. The records from chiropractic treatment indicate claimant's neck symptoms following the car accident were essentially resolved by June 1996.

7. On February 4, 1997, claimant woke in the middle of the night with pain radiating from the left side of her neck down her left shoulder and arm. Claimant went the next day to Dr. Zollinger who sent her to Dr. Lester James. Dr. James ordered x-rays and a CAT

scan. Dr. James then referred claimant to Dr. Eustaquio O. Abay, II, a neurosurgeon. Dr. Abay ultimately performed surgery, a fusion at C-7.

8. Claimant had injured her neck in an earlier accident, one in 1989. The 1989 accident left her unable to look directly overhead.

9. Dr. Abay gave his opinion about the cause of the injury he treated in 1997. He testified claimant probably initially injured her neck in the work accident and then aggravated that injury in the automobile accident. He opined that she did not herniate her disc in either accident but testified that herniation can occur in degrees. He concluded both the work accident and the automobile accident contributed to the injury he found but also testified that he could not apportion the injury between the two.

10. Dr. Daniel D. Zimmerman examined claimant at the request of claimant's counsel. He found claimant has a 15 percent impairment to her neck and opined that 50 percent of the impairment was from the work injury and 50 percent from the automobile accident. Of the 15 percent, he attributed 6.5 percent to loss of range of motion with 9 percent assigned to the surgical treatment of the neck. When told claimant had been unable to look directly overhead before the current injury, he testified it was impossible to say whether the loss of range of motion he found was partially or totally from the 1989 automobile accident.

Dr. Zimmerman also assigned a rating for the shoulder injury, 14 percent of the shoulder, or 8 percent of the whole person.

11. The Board concludes claimant does not have permanent impairment to her neck as a result of the January 23, 1996, work injury.

Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).

2. The Board concludes claimant did suffer injury to her neck as well as her shoulder in the accident of January 23, 1996. But the Board also concludes claimant has not proven that she suffered permanent injury to her neck as a result of the January 23, 1996 accident, and even if there were permanent injury, has not proven the extent of the permanent injury.

3. The Board agrees with Dr. Abay's conclusions regarding apportionment. It would be impossible to reasonably apportion claimant's neck injury between the work accident and the 1996 car accident. In fact, the Board cannot conclude from the evidence that the neck injury would not have completely resolved with no permanent impairment. The 1989 accident adds to the difficulty because it is not possible to determine how much of claimant's loss of range of motion was caused by the 1989 accident. The Board considers

Dr. Zimmerman's 50-50 apportion to be too speculative to warrant reliance. Even if it were reliable, the statement that 50 percent of the total 15 percent impairment is from the work accident and 50 percent from the 1996 car accident is not precisely the same as stating that claimant would have a 7.5 percent impairment from the work accident. A preexisting problem can combine with a subsequent injury and contribute to an overall disability by 50 percent when the impairment from the initial injury would not have been 50 percent of the overall resulting impairment.

In deciding to affirm the Award, the Board does not suggest that, in order to prevail, claimant would need to prove that the work accident caused the herniated disc. It would be enough if claimant proved she had, or would have had, permanent impairment from the work injury. For the reasons given above, the Board concludes claimant has not met that burden.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish on December 10, 1999, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Kelly W. Johnston, Wichita, KS
- Vincent A. Burnett, Wichita, KS
- Jon L. Frobish, Administrative Law Judge
- Philip S. Harness, Director